



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable Robert Tata
Member, House of Delegates
4536 Gleneagle Drive
Virginia Beach, Virginia 23462

Dear Delegate Tata:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether it is constitutional for the Commonwealth of Virginia to deny an elected school board the right to determine the starting date for the school calendar.

Response

I am unable to conclude that § 22.1-79.1, which directs school boards to set the starting date for students after Labor Day, is unconstitutional.

Background

You relate that there are more than 130 school districts in Virginia. You further note that the State Board of Education permits seventy-four of these districts to set their own school calendars due to inclement weather and for other reasons. You note that § 22.1-79.1 directs local school boards to set the school calendar so that the opening day for students falls after Labor Day, except for "good cause." Although you do not specifically inquire about § 22.1-79.1, I must assume that your inquiry is directed to the constitutionality of that statute.

Applicable Law and Discussion

A prior opinion of the Attorney General has observed that

The Constitution of Virginia “apportions various responsibilities for the creation and maintenance of Virginia’s system of public education among the General Assembly, the State Board of Education, and the local school boards.” Article VIII of the Virginia Constitution vests the broader, statewide responsibilities in the General Assembly, in the State Board, and in the Superintendent of Public Instruction. Article VIII, § 7, provides that “[t]he supervision of schools in each school division shall be vested in a school board.” The constitutional scheme for public education makes the authority and responsibilities of local school boards subject to direction and limitation from the State Board and the General Assembly.^[1]

Consistent with this scheme, the 1986 Session of the General Assembly enacted § 22.1-79.1, which provided that:

Each local school board shall set the school calendar so that the first day students are required to attend school shall be after Labor Day. The Board of Education may waive this requirement on a showing of good cause.^[2]

By its terms, the legislation was to expire on July 1, 1988.³ The sunset provision was removed in 1998,⁴ and the definition of “good cause” was later added.⁵ The original language has remained unchanged in the current version of the law, now codified as § 22.1-79.1(A).⁶

¹2009 Op. Va. Att’y Gen. 77, 78 (citations omitted).

²1986 Va. Acts ch. 587, at 1457.

³*Id.*

⁴1988 Va. Acts ch. 114, at 125.

⁵1998 Va. Acts ch. 702, at 1624. Section 22.1-79.1(B) sets forth three circumstances constituting “good cause”:

“1. A school division has been closed an average of eight days per year during any five of the last 10 years because of severe weather conditions, energy shortages, power failures, or other emergency situations;

“2. A school division is providing, in the school year for which the waiver is sought, an instructional program or programs in one or more of its elementary or middle or high schools, excluding the electronic classroom, which are dependent on and provided in one or more elementary or middle or high schools of another school division that

According to the Department of Education for the 2009-2010 school year, the Board of Education authorized fifty-eight school divisions to begin their school calendars prior to Labor Day for emergency or weather-related causes, thirteen for dependent programs, and five divisions were permitted to have one or more schools open prior to Labor Day to accommodate experimental or innovative programs.⁷

A statute is not to be declared unconstitutional unless the court is driven to that conclusion.⁸ “Every reasonable doubt should be resolved in favor of the constitutionality of an act of the legislature.”⁹ Following this doctrine, it has been a long-standing practice of Virginia’s Attorneys General to refrain from declaring a statute unconstitutional unless its unconstitutionality is clear beyond a reasonable doubt.¹⁰ This practice has its origins in well-founded considerations. Unlike a court, the Attorney General has no power to invalidate a statute.¹¹ Thus, when an Attorney General opines that a

qualifies for such waiver. However, any waiver granted by the Board of Education pursuant to this subdivision shall only apply to the opening date for those schools where such dependent programs are provided; or

“3. A school division is providing its students, in the school year for which the waiver is sought, with an experimental or innovative program which requires an earlier opening date than that established in subsection A of this section and which has been approved by the Department of Education pursuant to the regulations of the Board of Education establishing standards for accrediting public schools. However, any waiver or extension of the school year granted by the Board of Education pursuant to this subdivision or its standards for accrediting public schools for such an experimental or innovative program shall only apply to the opening date for those schools where such experimental or innovative programs are offered generally to the student body of the school. For the purposes of this subdivision, experimental or innovative programs shall include instructional programs that are offered on a year-round basis by the school division in one or more of its elementary or middle or high schools [the “experimental or innovative” cause].”

⁶2003 Va. Acts ch. 724, at 981.

⁷See Bd. of Educ., Meeting Agenda, Item L (Apr. 22, 1010), available at http://www.doe.virginia.gov/boc/meetings/2010/04_apr/agenda_items/item_l.pdf (last visited April 27, 2010).

⁸City of Roanoke v. James W. Michael’s Bakery Corp., 180 Va. 132, 142, 21 S.E.2d 788, 792 (1942).

⁹*Id.* at 143, 21 S.E.2d at 793 (citing Hunton v. Commonwealth, 166 Va. 229, 236, 183 S.E. 873, 876 (1936)).

¹⁰See, e.g., 2007 Op. Va. Att’y Gen. 30, 35.

¹¹*Id.*

statute violates the Constitution, that statute nevertheless remains in force.¹² Further, by opining that a statute is unconstitutional, an Attorney General, in effect, is advising the enforcing state agency to ignore the statute.¹³ Unless an Attorney General is certain beyond a reasonable doubt that a reviewing court would strike down the statute, he should not opine that a statute is unconstitutional.¹⁴

No Court has declared this statute unconstitutional, nor do I find any controlling decision on point. A prior opinion of the Attorney General (“1985 Opinion”) determined that it was “constitutionally permissible for the General Assembly to mandate that the opening date for public schools be no earlier than Labor Day,”¹⁵ noting that:

[T]he General Assembly would be extending its previously mandated number of instructional days to specify that the school year may not commence before a specified date.... I do not view this requirement as an intolerable intrusion into the prerogatives reserved to the local school boards by Art. VIII, § 7. Establishment of a beginning date is within the power reserved to the General Assembly by Art. IV, § 1, as well as Art. VIII, § 1, and cannot be said to be in derogation of the powers reserved to local units of government for supervising the schools. Setting the date for the commencement of the school year can be analogized with the designation of holidays or days when schools must be closed, a prerogative of the legislative branch of government.¹⁶

The 1985 Opinion addressed a blanket prohibition of a pre-Labor Day school calendar and not the more flexible program contained in current law.

¹² *Id.*

¹³ *Id.*

¹⁴ 1995 Op. Va. Att’y Gen. 164, 165 (citations omitted).

¹⁵ 1984-1985 Op. Va. Att’y Gen. 269, 270.

¹⁶ *Id.*

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Conclusion

Accordingly, I am unable to conclude that § 22.1-79.1, which directs school boards to set the starting date for students after Labor Day is unconstitutional.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Ken Cuccinelli II". The signature is stylized with a large "K" and "C", and the Roman numeral "II" is written separately to the right.

Kenneth T. Cuccinelli, II
Attorney General